

June 20, 2019

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

RE: South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Each Electrical Utility's Standard Offer, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended)
Docket No. 2019-176-E
Docket No. 2019-185-E (Duke Energy Carolinas, LLC)
Docket No. 2019-186-E (Duke Energy Progress, LLC)

Dear Ms. Boyd,

On June 17, 2019, Duke Energy Carolinas, LLC (“DEC”) and Duke Energy Progress, LLC (“DEP,” and together with DEC, the “Companies” or “Duke”) filed with the Public Service Commission of South Carolina (the “Commission”) in the above-referenced dockets a letter requesting to administratively close Docket No. 2019-176-E and stating their intent to address the provisions of newly enacted S.C. Code Section 58-41-20(A) related to “each electrical utility's standard offer, avoided cost methodologies, form contract power purchase agreements, commitment to sell forms, and any other terms or conditions necessary” (the “PURPA Implementation and Administration Provisions”) under the utility-specific dockets (Docket No. 2019-185-E for DEC and 2019-186-E for DEP) opened at the direction of the Commission. On June 18, 2019, Johnson Development Associates, Inc. (“Johnson Development”) filed a letter asking the Commission to consolidate the PURPA Implementation and Administration Provisions of Act 62 for all electrical utilities into one docket (“June 18 Letter”). Additionally, on June 18, 2019, the South Carolina Solar Business Alliance (“SCSBA”) and Johnson Development filed joint comments on this matter (“Joint Comments”), setting forth a proposed procedural approach, which seemingly would require consolidation of the dockets and two sequential proceedings.¹ Duke responds herein to the June 18 Letter and Joint Comments and requests the Commission

¹ The Joint Comments are unclear as to whether the procedural approach would require a third proceeding to address form contract power purchase agreements, notice of commitment to sell forms and contract length.

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issue a decision expeditiously approving the procedural schedule filed by the Companies today in Docket Nos. 2019-186-E and 2019-185-E, or, in the alternative, set the issue for oral argument within two weeks, in light of the November 15, 2019 deadline by which the Commission must act on the PURPA Implementation and Administration Provisions.

The procedural approach to implementing PURPA Implementation and Administration Provisions of the Act set forth by Johnson Development and SCSBA in their Joint Comments is in clear violation of the requirements of S.C. Code Ann. Section 58-41-20(A)(2); fails to provide adequate time for the Commission to consider the complex and numerous issues required to be addressed by the Commission; and deprives Companies and other parties the right of procedural due process.²

First, the proposed schedule set forth by Johnson Development and SCSBA is a clear violation of S.C. Code Ann. Section 58-41-20(A)(2), which requires that proceedings implementing the PURPA Implementation and Administration Provisions of Act 62 “shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing.” Johnson Development and SCSBA propose that, with regard to the proceeding to address the avoided cost methodology, the parties file comments instead of sworn testimony and that the Commission hold a technical conference, upon which it will make its decision. Additionally, the schedule makes no mention of and provides no time for the opportunity for discovery. This is blatantly inconsistent with the requirements S.C. Code Ann. Section 58-41-20(A)(2). This conflict with Act 62 requires the Commission to reject Johnson Development’s and SCSBA’s proposed procedural approach schedule.

Notwithstanding the conflict with Act 62, the procedural schedule described in the Joint Comments is wholly impracticable, unreasonably segregating issues while failing to provide any reasonable measure of time for the Companies to put forward their case and the Commission and its consultant to review the case. Johnson Development and SCSBA are requesting the Commission hold two proceedings sequentially, with the latter proceeding not to begin before the conclusion of the first proceeding. As of the date of this filing, less than five months exist before the Commission must issue a decision on the myriad of topics set forth in the PURPA Implementation and Administration Provisions of Act 62. Simply put, sufficient time does not exist for the parties to conduct two sequential proceedings, which “shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing” in accordance with S.C. Code Ann. Section 58-41-20(A)(2). The proposed schedule provides the Commission 11 business days to issue its decision on these issues after the first comments are filed. The Companies submit that it is not feasible to conduct a proceeding evaluating the three

² The Companies also contend that consolidating all utilities into single proceedings for the purpose of implementing the PURPA Implementation and Administration Provisions is inappropriate and unreasonable, but, but given that the proposed approach clearly violates S.C. Code Ann. Section 58-41-20(A)(2), the Companies have not included this argument in this response.

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utilities' avoided cost methodologies, including the assumptions underlying those methodologies over the course of 11 business days.

As a general matter, the Companies also object to the proposal by Johnson Development and SCSBA that the Commission should issue a decision based on information exchanged in a "technical conference." While technical conferences have been held by stakeholder groups in the past to negotiate issues toward a potential consensus, the Companies are not aware of any instance where the Commission has participated in those workshops, and certainly not of any instance where the Commission has relied on information exchanged in such a forum in making a decision in a contested proceeding. As this Commission is well aware, any information offered for inclusion into the record should be subject to objection or cross examination and comply with the rules of evidence pursuant to S.C. Code Ann. Section 1-23-330. Otherwise, the Companies' rights to procedural due process will be violated. Again, S.C. Code Ann. Section 58-41-20(A)(2) is clear that proceedings pursuant to this statutory section "shall include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing." Accordingly, it would be wholly improper for the Commission to adjudicate these issues without an opportunity for discovery, testimony, or an evidentiary hearing.

In sum, the procedural approach and schedule supported by Johnson Development and SCSBA violates S.C. Code Ann. Section 58-41-20(A)(2) and the parties' rights to procedural due process, in addition to presenting a wholly unworkable (and incomplete) procedure schedule that provides entirely insufficient time for these complex issues to be litigated and decided by the Commission. Therefore, the Companies respectfully request the Commission reject the proposed schedule of Johnson Development and SCSBA and adopt the procedural schedule filed by the Companies contemporaneously with this letter in Docket Nos. 2019-186-E and 2019-185-E. As described in the Companies' letter, the ORS does not object to the Companies' proposed schedule. Alternatively, the Companies request the Commission schedule this controversy for oral argument within the next two weeks. The Companies submit that should this issue be scheduled for oral argument, S.C. Code Ann. Section 58-3-260(C)(6)(vi) prevents Johnson Development from discussing these contested procedural issues at its upcoming allowable *ex parte* briefing within 20 days of such oral argument.³

³ In its June 18 Letter, Johnson Development states that it intends to present information in support of its position to the Commission in its allowable *ex parte* briefing scheduled for June 26, 2019. In general, S.C. Code Ann. § 58-3-260 prohibits discussion with the Commission about procedural matters that are in controversy. *See* S.C. Code Ann. § 58-3-260(B) and (C)(1). The matters addressed herein are procedural issues in controversy. If an oral argument is scheduled, it would be inappropriate for Johnson Development to address this matter at its June 26, 2019 allowable *ex parte* briefing unless the Commission schedules the oral argument or hearing for 20 business days after the *ex parte* briefing. *See* 58-3-260(C)(6)(vi) restricting an allowable *ex parte* briefing from being held within 20 business days prior to a hearing in a proceeding of the same subject matter.

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The Companies appreciate the Commission's prompt attention to these matters. Should you have any questions regarding this request, please do not hesitate to contact me at 803.988.7130.

Sincerely,



Rebecca J. Dulin

cc: Ms. Becky Dover, SC Department of Consumer Affairs
Ms. Carri Grube-Lybarker, SC Department of Consumer Affairs
Mr. James Goldin, Nelson Mullins Riley & Scarborough, LLP
Mr. Weston Adams, III, Nelson Mullins Riley & Scarborough, LLP
Mr. Jeffrey Nelson, Office of Regulatory Staff
Mr. Richard L. Whitt, Austin & Rogers, P.A.
Ms. Heather Shirley Smith, Duke Energy Corporation